86-337

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-1657
(W.D. Oklahoma)
(D.C. No. CIV 83-419-R)

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J.L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants-Appellees,

UNITED STATES OF AMERICA and
ASSOCIATION OF AMERICAN RAILROADS,
Amici Curiae.

[Filed May 2, 1986]

ORDER AND JUDGMENT

Before McKAY, LOGAN, and BALDOCK, Circuit Judges.

Burlington Northern Railroad Company appeals from the dismissal of its complaint brought under § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503, for want of subject matter jurisdiction. The railroad had sought not "equalization" but "valuation" relief, claiming its properties were valued at more than true market value for Oklahoma ad valorem tax purposes.

This case is controlled by our decision in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984), in which we held that § 306 focused on equalization, not valuation, relief. *Id.* at 497-98. We reasoned that permitting railroads to use § 306 to challenge state calculation of the market value of properties "would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions." *Id.* at 498. Without an express directive from Congress, we were "unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." *Id.* We therefore held that the district court had no jurisdiction to maintain such a suit unless a railroad could "make a strong showing of a purposeful overvaluation . . . with discriminatory intent." *Id.*

The district court correctly applied *Lennen* by requiring Burlington Northern to make a strong showing of intentional discrimination through overvaluation to establish jurisdiction. The district court considered material submitted by the parties but refused to hold a hearing or reserve the overvaluation question for trial. It stated accurately that *Lennen* contemplated resolution of the jurisdictional issue before trial on the merits. It found the railroad's materials insufficient to establish a strong prima facie case and dismissed for lack of jurisdiction.

Burlington Northern first asks us to overrule *Lennen*. If *Lennen* stands, the railroad contends the district court

(1) should not have ruled on the disputed jurisdictional facts without a hearing or until the trial on the merits; (2) erred in holding that Burlington Northern failed to make a strong showing of purposeful overvaluation with discriminatory intent; and (3) should have ordered discovery of a state-commissioned appraisal report on the railroad's property. We find no merit in any of these contentions and affirm.

Recognizing that a prior decision of this court can be overruled only by this court en banc, Burlington Northern sought en banc review. The request was denied by a unanimous vote of the court. We realize there is language in *Burlington Northern Railroad v. Bair*, 766 F.2d 1222 (8th Cir. 1985), that may be read as inconsistent with our intentional discrimination ruling in *Lennen*. 766 F.2d at 1225-26. But *Bair* expressly states that Burlington Northern did not appeal the district court's dismissal of its claim alleging overvaluation. *Id.* at 1225. The language therefore is dicta. Further, in the same discussion *Bair* cites but distinguishes *Lennen* and notes with approval *Atchison, Topeka & Santa Fe Railway v. Lennen*, 732 F.2d 1495 (10th Cir. 1984), a later related case. *Louisville and Nashville Railroad v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984), which Burlington Northern also relies on in this appeal, does not purport to disagree with our first *Lennen* decision and, indeed, cites it as authority on one point.

We remain convinced of *Lennen*'s soundness and reaffirm its holding.

We agree with the district court that Burlington Northern failed to establish a strong initial showing of prima facie case of intentional discrimation. Burlington Northern did not allege knowledge of any state officials' remarks regarding an intent to discriminate in valuation. Nor did it allege any procedure that on its face demonstrated valuation discrimination against railroads,

e.g., a valuation formula that capitalized railroad earnings at a higher rate than earnings of other entites.

Burlington Northern also did not allege facts from which a trier of fact reasonably could infer discriminatory intent, such as assessments based on flat rates that take no account of an item's value, assessments that ignore changed business conditions, or unexplained radical changes in the methods for calculating value. The state tax board made assessment changes that attempted to consider business conditions and bring the railroad calculation into line with other calculations. Burlington Northern argues that these attempts were unsuccessful. Although that might be true, lack of success does not amount to a strong showing of discriminatory intent.

Burlington Northern alleges that prior overassessments of railroad property demonstrate discriminatory intent. Even if there was an earlier pattern of overassessment, the 1982 calculation challenged here broke the pattern. Earlier calculations had used questionably high assessment percentages; in 1982 Oklahoma equalized assessment percentages. The new system clearly reflected an attempt to comply with § 306 and rectify prior problems.

Burlington Northern argues that the sharply increased market value Oklahoma assigned to railroad property in 1982 and its expert's testimony that the true 1982 market value was much lower also show discriminatory intent. But it is uncontested that the 1982 figure was calculated differently than previous figures as part of the new system. The expert's testimony simply established that there was a difference of opinion over what the true market value was. Burlington Northern makes much of the fact that the new system's market value calculation fails to reduce "cost" by "obsolescence." But the new calculation appears to allow "depreciation." R. I, 27-28, 106, 128. Arguably the new calculation should *increase* "cost" by some amount for inflation.

Viewed in the light most favorable to Burlington Northern, the materials presented established the existence of a legitimate question over the actual market value of Burlington Northern property [1], but not of a legitimate question regarding overvaluation with discriminatory intent. We therefore agree with the district court that Burlington Northern failed to make the strong prima facie showing required to establish jurisdiction.

Finally, we see no error in the district court's refusal to order the deposition of independent appraisers commissioned by the state. The court found the appraisers protected from the deposition under Fed. R. Civ. P. 26 (b) (4) (B), as expert witnesses who were consulted in anticipation of trial but not intended to be called at trial. Under that rule such witnesses may be deposed only under "exceptional circumstances." We may reverse the trial court's finding that no such circumstances were present only if it abused its discretion. It did not.

AFFIRMED.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

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[1] Oklahoma acknowledges that there is a conceivably valid dispute over the 1982 market value figure. There is no allegation that Burlington Northern has been prevented from pursuing state administrative and court remedies to settle it.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

—VS—

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants.

CIV 83-2165-R

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Plaintiff,

—VS—

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE

STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants.

[Filed Jan. 8, 1985]

ORDER

The Plaintiffs in these actions seek relief from ad valorem tax assessments made against them by the Oklahoma taxing authorities, in particular by the Defendant Oklahoma Tax Commission (OTC). In the first action, No. CIV-83-419-R ("the 1982 tax case"), the single Plaintiff Burlington Northern demands the following relief for the 1982 tax year: (1) a judicial declaration that the Oklahoma ad valorem tax assessment procedure violates § 11503 of the Interstate Commerce Act, 49 U.S.C. § 10101 - § 11917 (1982); and, (2) a permanent injunction prohibiting the collection of the disputed amounts imposed thereunder. Similar relief is sought for the 1983 tax year in No. CIV-83-2165-R ("the 1983 tax case") by Burlington Northern and Missouri Pacific, the Plaintiffs St. Louis Southwestern and Missouri-Kansas-Texas having been dismissed from the action. Many of the legal and factual issues are identical in the two cases, and for that reason the Court ordered them consolidated for discovery and is yet considering consolidation for trial.

The Defendants have filed Motions to Dismiss in both actions. In the 1982 tax case the Defendant filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)

(6), which the Court deems moot in light of a subsequent amendment to the Complaint. More substantial, and the subjects of this Order, are the Motions to Dismiss for lack of subject matter jurisdiction filed in each of the cases pursuant to Fed. R. Civ. P. 12(b)(1). The motions have been fully briefed, voluminously so in the 1982 tax case, and the Court is now prepared to dispose of the motions in both cases in this Order. Accordingly, the Plaintiffs' applications for an evidentiary hearing and oral argument are denied, as those proceedings are unnecessary to a disposition of the motions.

I.

The dispute that is the subject of these actions arises from the method used in Oklahoma to calculate railroad property values for the purpose of imposing ad valorem taxes. A proposed assessment is submitted by the OTC to the State Board of Equalization. If approved, this assessment becomes the property value amount used ultimately by the entities which actually levy ad valorem taxes. The assessment is determined by multiplying the "Oklahoma value" of the railroad's property by a predetermined assessment ratio. The Oklahoma value is determined by multiplying the railroad's "system value", the total appraised value of all railroad property, by a coefficient estimated to be the ratio of property held within the state to total property held by the railroad. The system value is determined by a complex appraisal formula which uses two factors: the railroad's "original cost depreciated" and the railroad's "capitalized income." In the past years the relative weight assigned to these factors has changed, with consistently more emphasis being placed on capitalized income.

The entire process is regulated to some extent by federal law, which prohibits discrimination against railroads in the assessment and imposition of property taxes. 49 U.S.C. § 11503 (1982). The statute prohibits two classes

of discrimination in taxation, which can be distinguished by the source of the disparate impact involved. *Cf. Louisville & Nashville Railroad Co. v. Department of Revenue*, 736 F.2d 1495, 1498 (10th Cir 1984). One is *de jure* discrimination, which occurs when railroad property is taxed or assessed at a different rate than other "commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11503(b)(3). The second is *de facto* discrimination, which can occur despite imposition of facially fair tax or assessment rates. There are various forms of *de facto* discrimination, only one of which is relevant to these cases: taxing railroad property at an appropriate rate, but assessing or appraising railroad property at a value higher than its true market value. *See Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. den.* 104 S.Ct. 2690 (1984). It is this form of *de facto* discrimination of which the Plaintiffs complain, and the relief they seek is referred to as valuation relief. *'d.; Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. den.* 454 U.S. 1086 (1981).

The Plaintiffs contend that the Defendants have intentionally overvalued their property in a disingenuous effort to maintain high taxes while appearing to comply with the directives of § 11503. Noting that the Defendants have long violated the statute by applying a higher assessment ratio to railroad property than to other commercial property, *see* 49 U.S.C. § 11503(b)(1), the Plaintiffs contend that the Defendants inflated the railroads' system values to compensate for a lower assessment ratio adopted to bring Oklahoma into compliance with the statute. Thus, it is the Plaintiffs' position that they are required to pay taxes on a greater portion of their property than are other commercial property holders, even though the assessment ratios are the same for both classes.

The Defendants do not disagree that these cases involve bona fide valuation disputes. Indeed, the Defend-

ants concede the existence of a valuation issue that the Plaintiffs are entitled to have adjudicated at some point. However, the Defendants deny that this Court is the proper forum to resolve such a dispute. They assert that federal courts lack jurisdiction over *de facto* discrimination claims for valuation relief under § 11503 in all but a limited number of cases. In support of this proposition the Defendants rely on the decision of the United States Court of Appeals for the Tenth Circuit in *Burlington Northern Railroad Co. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. den.* 104 S. Ct. 2690 (1984).

In *Lennen*, the Court of Appeals considered a *de facto* discrimination claim similar to those at bar and concluded that the federal courts are without jurisdiction over such claims unless the "railroad can make a strong showing of purposeful overvaluation with discriminatory intent." 715 F.2d at 498. The Court based this conclusion on its finding that Congress in enacting § 11503 did not intend for the "railroads to escape the general noninterference rule of [28 U.S.C.] § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." *Id.* The jurisdictional rule announced in *Lennen* serves two important purposes: It avoids an inevitable clog of federal dockets and it prevents unreasonable delay of the state tax collection process. *Id.* Thus, the limitation of jurisdiction to those cases involving a discriminatory intent is apparently a rule designed to weed out those valuation disputes best left to state entities for resolution.

Although the Plaintiffs believe *Lennen* to be erroneously decided, they concede that the law in its current form casts upon them the burden of establishing this Court's jurisdiction over the actions by proof of discriminatory intent. There seems to be some suggestion by the Plaintiffs that this case is outside *Lennen*, being *de facto* or perhaps *de jure* discrimination by application of differing

assessment ratios to railroads; however, in the main, the Plaintiffs acknowledge that their claim is one for overvaluation of railroad property by the Defendants. These actions therefore are subject to the rule in *Lennen*, and the Court may entertain them only if the Plaintiffs make out "a strong prima facie case of . . . intentional discrimination" by the Defendants in overvaluating the Plaintiffs' property. 715 F.2d at 498.

II.

As a preliminary matter the Court must determine the appropriate procedure to be followed when a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss is based on an alleged lack of jurisdiction under *Lennen*. The question presented is complex, as the jurisdictional issue is intimately entwined with the merits of a § 11503 claim. The Plaintiffs must prove intentional discrimination to prevail upon their claims as well as to establish federal jurisdiction. Thus, at first blush it appears that the jurisdictional issue should be reserved for trial on the merits.

This is essentially the argument made by the Plaintiffs. Noting the close relationship between the jurisdictional issue and the merits of their claims, they assert that the proper procedure is to treat the Motions to Dismiss as Motions for Summary Judgment or, if summary judgment be inappropriate, to reserve the issue of jurisdiction for trial. *See, e.g., Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628, 630 (W.D. Okla. 1975). The Defendants disagree, apparently taking issue with the idea that jurisdictional questions may be required to await trial on the merits. The Defendants urge the Court to resolve the jurisdictional dispute prior to trial, as suggested by Fed. R. Civ. P. 12(d).

There is ample merit in the arguments of both the Plaintiffs and the Defendants. Nevertheless, the Court declines to adopt either position *in toto*. It is true that

summary judgment on the jurisdictional issue is appropriate when all the material facts pertaining to jurisdiction are undisputed. Fed. R. Civ. P. 56. However, the mere existent of a factual dispute concerning the Defendants' intent is not sufficient to warrant trial on the merits, as the Plaintiffs suggest. The Court should permit trial on the merits only if the Plaintiffs make the requisite "strong prima facie case of . . . intentional discrimination." *Lennen*, 715 F.2d at 498. The Court finds this to be a more stringent burden on the Plaintiffs than the burden involved in avoiding summary judgment; there must be a strong showing of intentional discrimination whether the facts supporting the showing are disputed or not. Thus, the Court concludes that these cases should proceed to trial on the merits only if the Plaintiffs carry the burden enunciated in *Lennen*. To hold otherwise would necessitate a trial on the merits in most, if not all, *de facto* discrimination cases, a result inconsistent with the express purposes of the restrictive *Lennen* rule. 715 F.2d at 498 ("Such a rule [broadening federal jurisdiction] would impose significant burdens on district courts . . .").

Accordingly, the Court concludes that the jurisdictional issue raised herein must be resolved prior to trial, subject of course to the power of the Court to dismiss the action any time it appears that jurisdiction is lacking. *See* Fed. R. Civ. P. 12(h)(3).

III.

The Defendants' Motions to Dismiss raise the question whether the Plaintiffs can prove intentional discrimination by overvaluation of railroad property on the part of the Defendants. Because the Court finds that the Plaintiffs cannot do so in a sufficiently convincing manner to satisfy the jurisdictional requirement of *Lennen*, the Court concludes that these actions must be dismissed for lack of subject matter jurisdiction.

The Plaintiffs' argument that a prima facie case of intentional discrimination has been made in these cases rests upon two assertions: (1) That substantial changes were made in the method used by the OTC to determine the railroads' system value; and, (2) that such changes reflect an intent on the part of the Defendants to maintain aggregate railroad assessments at near 1981 levels, despite a reduction in the assessment ratio to comply with § 11503. While the Court agrees with the Plaintiffs' first assertion, it cannot accept the second.

It is undisputed that Oklahoma's assessment process for 1982 is substantially changed from that used in years past, including that used in 1981. First, the OTC determined in 1982 that railroad property must be assessed by the same assessment ratio used to assess other commercial and industrial property in Oklahoma. This determination represents a clear break with the past, and was necessary to bring Oklahoma into compliance with federal statute. 49 U.S.C. § 11503(b)(3). Second, there was a change in the relative weight assigned to the two factors used to determine the railroads' full system value. For 1982, original cost depreciated was weighted at sixty percent and capitalized income was weighted at forty percent, while in 1981 those factors had been weighted at seventy-five percent and twenty-five percent, respectively. This change in relative weight was an ongoing process which began in 1976. It should be noted that this shift in emphasis serves the interests of the railroads, which favor a valuation system based on capitalized income. Third, in 1982 the Director of the Ad Valorem Tax Division ceased holding assessment conferences with the railroads' tax managers. In years past these informal conferences had been used to explain the assessment procedure to the tax managers and to allow for negotiations in the valuation process. The conferences were discontinued at the direction of the OTC. Finally, in 1982 the OTC no longer reduced system value by a factor designed to account for "economic obsolescence." This reduction

had taken place at the assessment conferences through the negotiations between the Director and the tax managers and, when the conferences were discontinued, the obsolescence reduction abated with them. Thus, the 1982 tax year saw substantial changes in methodology from the 1981 tax year.

However, the Court cannot agree that those changes reflect intentional discrimination against the railroads. First, the utilization of a uniform assessment ratio was mandated by federal statute and in fact inured to the benefit of the railroads, as it brought a marked reduction in the assessment ratio applied to railroad property. Second, the change in weighting assigned to the valuation factors also benefitted the railroads, as by their own admission the railroads favor a valuation system based on capitalized income. In 1982 greater weight was assigned to capitalized income than ever before. Third, the discontinuation of assessment conferences, while facially unfavorable to the railroads, does not indicate intentional discrimination on the part of the Defendants. The conferences were discontinued as part of an effort to insure uniformity of treatment in valuation, a purpose furthered by removal of the inherent nonuniformity of the negotiation process with individual railroad representatives. Finally, the deletion of economic obsolescence reductions does not suggest discrimination, as the reductions were also a product of individual negotiations. Although the absence of such a reduction might imply higher system value, the Plaintiffs' remedy for this problem is valuation relief, which is not available in the federal courts absent intentional discrimination by the Defendants.[1] Thus, the Court concludes that the changes made in 1982 do not reflect intentional discrimi-

[1] In any event, the absence of the reduction does not imply higher system value in this case; despite the fact that no obsolescence reduction was allowed in 1982, Burlington Northern's Oklahoma value for 1982 was lower than that obtained with an obsolescence reduction in 1981.

nation on the part of the Defendants against the Plaintiffs.

Nor do any of the other facts present in the record reflect intentional discrimination. While there is some indication that the OTC was concerned that aggregate railroad assessments should remain near 1981 levels, there is nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio. Had the OTC been motivated solely by this concern, as the Plaintiffs assert, it could have eschewed the lower assessment ratio based on locally assessed commercial and industrial properties in favor of a higher assessment ratio, one which would take into account those properties which are centrally assessed. In the interest of complying with the statute, the OTC scrupulously chose to adopt the more conservative approach, despite the fact that the more profitable alternative has been found to be consistent with § 11503. *E.g., Atchison, Topeka & Santa Fe Railway Co. v. Lennen*, 732 F.2d 1495, 1504-5 (10th Cir. 1984); *Ogilvie*, 657 F.2d at 208-9. Further, at least in the case of Burlington Northern, the Oklahoma value, the amount to which the assessment ratio is applied, is less in 1982 than in 1981, a fact which clearly negates any suggestion that 1982 system values were inflated, intentionally or otherwise, to offset a lowered assessment ratio. Thus, the Court cannot conclude that system values were manipulated to maintain high aggregate assessments in the face of a reduced assessment ratio.

Perhaps the most telling fact concerning allegations of intentional discrimination is that Burlington Northern's annual assessments have fallen gradually but constantly in every year since the current valuation system was adopted in 1976. The 1982 assessment is substantially less than the 1981 assessment, and indeed it is less than Burlington Northern's own self-assessment made in 1981. Far from establishing a strong prima facie case of intentional discrimination against the railroad, this pattern

does just the opposite; it suggests at least a modicum of equitable treatment by the Defendants. Such an inference is of course unnecessary, as the *Lennen* burden lies with the Plaintiffs, but it does indicate the failure of the Plaintiffs to make out "a strong prima facie case of . . . intentional discrimination." 715 F.2d at 498.

It is apparent that the Defendants have violated § 11503 in years prior to 1982. The Defendants themselves do little to deny this fact. However, neither the 1982 tax case nor the 1983 tax case raises the issue of past violations, other than to suggest that the earlier pattern of unfair treatment infers discrimination in these cases. The Court finds that these past violations do not infer such discrimination. The 1982 tax year marked a clean break with the past, produced by purposeful action on the part of the OTC to bring Oklahoma into compliance with § 11503. The 1982 and 1983 tax years are thus not a continuation of a past pattern of tax discrimination.

It must finally be noted that there is some indication that the Plaintiffs' property has in fact been overvalued. Indeed, the Defendants themselves admit the existence of a legitimate valuation dispute between the parties. However, as the Defendants contend, this is simply not a dispute that this Court can adjudicate or remedy. In the absence of a strong showing by the Plaintiffs of intentional discrimination on the part of the Defendants, the Court is without jurisdiction to entertain these *de facto* discrimination claims of overvaluation. *Lennen*, 715 F.2d at 498. The Plaintiffs must therefore air their complaints concerning Oklahoma's valuation process in a forum provided by the State of Oklahoma. *Cf. Burlington Northern Railroad Co. v. Lennen*, 573 F. Supp. 1155, 1167 (D. Kan. 1982), *aff'd.* 715 F.2d 494 (10th Cir. 1983), *cert. den.* 104 S. Ct. 2690 (1984).

IV.

All evidence and arguments presented herein by the Plaintiffs were submitted by Burlington Northern in opposition to the Defendants' Motion to Dismiss in the 1982 tax case. The Motion to Dismiss was much less extensively briefed in the 1983 tax case. Nevertheless, the Court concludes that the evidence and arguments pertain equally to both cases. The differences between the two are that there are multiple Plaintiffs in the 1983 case and that 1983 property valuations are at issue. Presumably, the evidence relied upon to establish intentional discrimination is the same for both cases; indeed, the Plaintiffs suggest as much in their Motion to Consolidate these cases for discovery and trial. In any event, the Plaintiffs apparently find the evidence presented in the 1982 tax case to be sufficient to decide the jurisdictional issue in the 1983 tax case, as they have chosen not to supplement the record in the latter case beyond that already presented in the 1982 tax case. Thus, the Court concludes that the jurisdictional issue in both cases turns on the jurisdictional facts presented in the 1982 tax case, and that the result must be the same in both cases.

Accordingly, the Defendants' Motion to Dismiss in No. CIV-83-419-R, and their Motion to Dismiss in No. CIV-83-2165-R, are both granted. Both actions are hereby dismissed for lack of subject matter jurisdiction. Separate judgments will be entered reflecting the action of the Court.

IT IS SO ORDERED this 8th day of January, 1985.

/s/ David L. Russell
DAVID L. RUSSELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

-vs-

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants.

[Filed Jan. 8, 1985]

JUDGMENT

In accordance with the Order entered this same 8th day of January, 1985, it is ORDERED, ADJUDGED and DECREED that the above entitled action is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED this 8th day of January, 1985.

/s/ David L. Russell
DAVID L. RUSSELL
United States District Judge

NOVEMBER TERM—December 9, 1985

Before William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore and Honorable Stephen H. Anderson, Circuit Judges.

No. 85-1657

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, *etc., et al.*,
Defendants-Appellees,

UNITED STATES OF AMERICA, ASSOCIATION OF AMERICAN RAILROADS,
Amici Curiae.

This matter comes on for consideration of appellant's motion for hearing en banc, and the briefs in support of appellant's motion for hearing en banc filed by the United States of America and the Association of American Railroads, in the captioned cause.

Upon consideration whereof, appellant's motion for hearing en banc is denied by the Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed

in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-83-419 T

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants.

[Filed Mar. 3, 1983]

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

1. This is a civil action seeking to restrain and enjoin the Defendants, and those in active concern and active participation with them, from levying or collecting certain ad valorem taxes from the Plaintiff for the 1982 tax year to the extent that such taxes are based upon assessments that are excessive and unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform

Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (February 5, 1976), now codified as 49 U.S.C. § 11503 and referred to herein as "Section 306." Plaintiff also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Defendants' assessments of the Plaintiff's property for the 1982 tax year, and the levy or collection of excessive ad valorem taxes based upon such assessments, violate Section 306.

JURISDICTION

2. Jurisdiction of this Court is based upon the following grounds:

a. Section 306(2) which confers jurisdiction upon district courts of the United States (notwithstanding 28 U.S.C. § 1341 and without regard to amount in controversy or citizenship of the parties) to prevent a state, subdivision of a state, or any authority acting for a state or subdivision of a state, from levying or collecting ad valorem taxes that are based upon assessments of rail transportation property that bear a higher ratio to the true market value of such rail transportation property than the ratio at which other commercial and industrial property is assessed in the same assessment jurisdiction;

b. 28 U.S.C. § 1337 (as more fully appears herein, this action arises under an act of Congress regulating commerce); and

c. 28 U.S.C. § 1331 [as more fully appears herein, this action arises under Article I, § 8, Cl. 3 (commerce clause) and presents a federal question].

PARTIES

3. Plaintiff, Burlington Northern Railroad Company (BN), a Delaware corporation with its principal place of business located in the State of Minnesota, BN is a common carrier by railroad and is duly qualified to do business in the State of Oklahoma. BN operates in the following counties of the State of Oklahoma: Alfalfa,

Blaine, Bryan, Caddo, Canadian, Carter, Choctaw, Comanche, Craig, Creek, Custer, Dewey, Garfield, Grady, Grant, Hughes, Jackson, Johnston, Kay, Kiowa, LeFlore, Lincoln, McCurtain, Major, Marshall, Murray, Muskogee, Noble, Okfuskee, Oklahoma, Okmulgee, Ottawa, Pawnee, Pontotoc, Pushmataha, Rogers, Seminole, Tillman, Tulsa, Washita and Woods.

4. Defendant, Oklahoma Tax Commission, is a commission of the State of Oklahoma authorized by law to make findings of fact and recommendations to the State Board of Equalization of the State of Oklahoma as to the value of all taxable property of railroads and public service corporations within the State of Oklahoma. The Oklahoma Tax Commission maintains its principal offices in Oklahoma City, Oklahoma.

5. Defendant, Odie A. Nance, is Chairman of the Commission.

6. Defendant, Robert L. Wadley, is Vice-Chairman of the Commission.

7. Defendant, J. L. Merrill, is a Secretary-Member of the Commission.

8. Defendant, State Board of Equalization of the State of Oklahoma (State Board), is an agency of the State of Oklahoma responsible for the valuation and assessment of all taxable property of railroad corporations and public service corporations within the State of Oklahoma. The State Board maintains its principal offices in Oklahoma City, Oklahoma.

9. Defendant, George Nigh, is the Chairman of the State Board.

10. Defendants, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen are members of the State Board.

AD VALOREM TAXATION IN OKLAHOMA

11. Under Oklahoma Statutes Annotated (Okla. Stat. Ann.), tit. 68, § 24.04, all real and personal property in the state, except that which is specifically exempted by law or relieved from ad valorem taxation by reason of a payment of an in lieu tax, is subject to ad valorem taxation.

12. Under Okla. Stat. Ann. tit., 68, § 2427, all taxable tangible personal property must be assessed at no more than thirty-five percent (35%) of its fair cash value, estimated at the price it would bring at a fair voluntary sale as of the first day of January. All taxable real property must be assessed at no more than thirty-five percent (35%) of its fair cash value estimated at the price it would bring at a fair voluntary sale as of the first day of January for (a) the highest and best use for which such property was actually used during the preceding calendar year; or (b) the highest and best use for which such property was last classified for use, if not actually used during the preceding calendar year.

13. Under Okla. Stat. Ann., tit. 68, § 2444, railroad property is subjected to ad valorem taxation for county, municipal, public school and other purposes to the same extent as the real and personal property of private persons. Every railroad and public service corporation doing business in Oklahoma must return to the Commission, on or before March 15 of each year, sworn lists or schedules of its taxable property listing the amount, kind and value of such property as it existed on the preceding, January 1.

14. Under Okla. Stat. Ann., tit. 68, § 2454, the Commission must make findings as to the assessment of all railroad and public service corporation property and present its recommendations regarding such assessments to the State Board for final action. The Commission determines a recommended assessment of a railroad's property

in the following manner: (a) the Commission first estimates the full system value of the railroad's operating property wherever located; (b) the Commission allocates a portion of the railroad's full system value to the State of Oklahoma using an allocation percentage, or factor; and (c) the Commission multiplies the railroad's allocated system value by an assessment percentage or ratio. The resulting number is the Commission's recommended assessment.

15. Under Okla. Stat. Ann., tit. 68, § 2443, the property of all railroad and public service corporations must be assessed annually by the State Board at no more than thirty-five percent (35%) of its fair cash value estimated at the price it would bring at a fair voluntary sale.

16. Under Okla. Stat. Ann., tit. 68, § 2456, the State Board must cause the assessed valuations of the property of railroad and public service corporations to be certified by the State Auditor and inspector to the county assessors of each county in which such property is located. County assessors must enter such valuations on the county assessment rolls and subject such assessments to the same levies as other property.

17. Under Okla. Stat. Ann., tit. 68, § 2462, the Commission must render its findings as to the adjustment and equalization of the valuation of real and personal property throughout the State of Oklahoma and present such findings and recommendations with the State Board.

18. Under Okla. Stat. Ann., tit. 68, § 2463, the State Board must examine the various county assessments and equalize, correct and adjust such assessments as between counties by increasing or decreasing the aggregate assessed value of any property or class of property in one or more counties so that such assessments conform to the definition of fair cash value, and so that assessment rolls are corrected to adjust and equalize the valuation of real and personal property throughout the state.

19. Under Okla. Stat. Ann., tit. 68, § 2430, ad valorem taxes are due on November 1 of each year and become delinquent unless paid in two equal installments on January 1 and April 1 following the assessment date.

SECTION 306

20. Section 306, a copy of which is attached to this Complaint as Exhibit A, declares discriminatory taxation of rail transportation property by states, political subdivisions of a state, or governmental entities or persons acting on behalf of such states or subdivisions, to constitute an unreasonable and unjust discrimination against and an undue burden upon interstate commerce. Section 306 states (in part):

> "It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

21. Section 306 defines "assessment" as "valuation for purposes of a property tax levied by any taxing district."

22. Section 306 defines "transportation property" to mean "transportation property, as defined in regulations of the [the Interstate Commerce] Commission, which is owned or used by common carrier by railroad subject to this chapter or which is owned by the National Railroad Passenger Corporation." All operating property of the BN that is subject to ad valorem taxation by the State of Oklahoma is "transportation property" within the meaning of Section 306.

23. Section 306 defines "commercial and industrial property" to mean "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy."

24. Section 306 was enacted on February 5, 1976, and, by its terms, became effective February 5, 1979. The purpose of delaying the effective date of Section 306 for a period of three years from its enactment was to give states an opportunity to conform their assessment laws and practices to the requirements of Section 306.

ASSESSMENT OF BN's PROPERTY FOR THE 1982 TAX YEAR

25. For the 1981 tax year, the State Board determined the full system value of BN to be $2,107,321,200. Based upon an allocation factor of 3.75% and an assessment

percentage or ratio of 19%, BN's assessment for the 1981 tax year was $15,014,650.

26. BN filed with the Commission a timely return of its property for the 1982 tax year.

27. A sales assessment ratio study conducted by the State of Oklahoma in 1981 showed that the average ratio of assessed value to true market value of commercial and industrial property in the State of Oklahoma was no greater than 10.87%

28. On May 6, 1982, the Commission advised BN by letter, a copy of which is attached to this Complaint as Exhibit B, that it had determined the fair cash value of BN's property subject to ad valorem taxation in the State of Oklahoma for the 1982 tax year to be $126,194,733.00. This estimate of BN's Oklahoma system value was based upon a full system value of BN of $3,574,921,544.00 (an increase of $1,467,600,344 over BN's 1981 full system value) and an allocation factor of 3.53%. The Commission further advised BN that it had submitted to the State Board for its consideration a proposed assessment of BN's property for the 1982 tax year of $13,717,367.00. This proposed assessment was based upon an assessment percentage or ratio of 10.87%. The Commission recommended reduction in BN's assessment ratio from 19% to 10.87% in order to give the appearance of complying with the requirements of Section 306.

29. On May 19, 1982, the State Board accepted the results of the sales assessment ratio study conducted by the State of Oklahoma and ordered that the taxable property of railroads operating in Oklahoma be assessed for the 1982 tax year at an assessment ratio or percentage of 10.87% of fair cash value.

30. On May 21, 1982, the State Board notified BN by letter, a copy of which is attached to this Complaint as Exhibit C, that the State Board had determined the fair cash value of BN's property subject to ad valorem taxation in the State of Oklahoma to be $126,194,733.00 and that it had assessed BN's property for the 1982 tax year at $13,717,367.00. This assessment was identical to that recommended by the Commission and was based upon a full system value of BN of $3,574,921,544.00, an allocation factor of 3.53%, and an assessment percentage or ratio of 10.87%.

31. On May 27, 1982, BN filed with the State Board a timely protest of the State Board's assessment of its property for the 1982 tax year.

32. On May 21, 1982, the State Board's assessment of BN's property was certified by the State Auditor and Inspector to the county assessors of each county in the State of Oklahoma in which BN operates.

33. On December 23, 1982, BN paid under protest the first installment of its 1982 ad valorem taxes based upon the State Board's 1982 assessment. The second installment of BN's 1982 ad valorem taxes is due April 1, 1983.

BN's SECTION 306 CLAIM

34. The true and correct full system value of BN's property as of January 1, 1982, is $1,495,253,000.00. Utilizing the Commission's and the State Board's allocation factor of 3.53%, the true market value of BN's system property allocated to the State of Oklahoma should have been $52,782,430.00. Utilizing the Commission's and the State Board's assessment percentage or ratio of 10.87%, BN's assessment in the State of Oklahoma for the 1982 tax year should have been no greater than $5,737,450.00.

35. The full system value determined by the Commission and the State Board ($3,574,921,544.00) exceeds the true market value of BN's system property ($1,495,253,000.00) by $2,079,668,544.00 or 139%. Similarly, the value of BN's system property allocated to the State of Oklahoma by the Commisison and the State Board ($126,194,733.00) exceeds the true market value of such property ($52,782,450.00) by $73,412,283.00, or 139%.

The ratio of assessed value ($13,717,367.00) to true market value ($52,782,450.00) of BN's property in the State of Oklahoma for the 1982 tax year is 26% ($13,717,367.00÷$52,782,450.00), not 10.87%.

36. Although the Commission and the State Board gave the appearance of complying with Section 306 by fixing a 1982 assessment percentage or ratio for BN of 10.87%, they in fact valued BN at a value far in excess of true market value and assessed BN at a far higher ratio of assessed value to true market value than 10.87%.

37. BN's assessment in the State of Oklahoma for the 1982 tax year ($13,717,367) exceeds the correct and lawful assessment of its property ($5,737,450) by $7,979,917. Thus, 58.17% of BN's assessment for the 1982 tax year ($7,979,917÷$13,717,367) is excessive and unlawful and 58.17% of the ad valorem taxes levied against BN's property for the 1982 tax year in Oklahoma are excessive and unlawful under Section 306.

38. BN's system property subject to valuation and assessment by the State Board for ad valorem tax purposes is "transportation property" within the meaning of Section 306.

39. For the 1982 tax year, the ratio of assessed value to true market value of commercial and industrial property in the State of Oklahoma is no greater than 10.87%.

40. The ratio of assessed value to true market value of BN's transportation property in the State of Oklahoma for the 1982 tax year (26%) exceeds the ratio applicable to other commercial and industrial property (10.87%) by more than 5%.

41. The Defendants' failure and refusal to reduce the full system value which forms the basis of BN's assessment, and the Defendants' failure and refusal to reduce BN's ratio of assessed value to true market value from 26% to 10.87%, result in a ratio of assessed value to true market value for BN that exceeds the ratio of assessed value to true market value for commercial and

industrial property in the State of Oklahoma for the 1982 tax year and violate Section 306.

42. Unless the Defendants, and those in active concert and participation with them, are enjoined from levying or collecting ad valorem taxes that are based upon such illegal assessments, BN will be obligated to pay excessive ad valorem taxes wrongfully assessed in violation of Section 306.

43. BN is entitled to a judgment pursuant to 28 U.S.C. § 2201 declaring that its property may not be assessed at a higher ratio of assessed value to true market value than 10.87% and that the Defendants, and those in active concert and participation with them, may not levy or collect ad valorem taxes based upon such excessive assessments.

44. WHEREFORE, BN prays that this Court:

1. Issue a preliminary and permanent injunction prohibiting the Defendants, and those in active concert or particpation with them, from levying or collecting the second installment of ad valorem taxes from BN for the 1982 tax year;

2. Issue a permanent injunction directing the defendants, and those in active concert or participation with them, to refund, or to credit toward future tax years, the excessive and unlawful portion of those 1982 ad valorem taxes paid under protest by BN as part of its first instaliment on December 23, 1982 (i.e. 8.17% of BN's total 1982 ad valorem tax liability as determined by the Defendants);

3. Issue a declaration declaring that the Defendants, and those in active concert or participation with them, have assessed BN's property for ad valorem tax purposes for the 1982 tax year at a ratio of assessed value to true market value in excess of 10.87% and that the Defendants, and those in active concert or participation with them, may not levy or collect ad valorem taxes for the 1982 tax year based upon such excessive assessments.

EVERETT B. GIBSON
JAMES W. MCBRIDE
GREGORY G. FLETCHER
LAUGHLIN, HALLE, CLARK,
GIBSON & MCBRIDE
Suite 1101
1700 K Street, N.W.
Washington, D.C. 20006

PIERSON, BALL & DOWD
Suite 1310, First
Oklahoma Tower
210 West Park Avenue
Oklahoma City,
Oklahoma 73102

By: /s/ Michael Minnis
MICHAEL MINNIS

VERIFICATION

STATE OF MISSOURI
COUNTY OF GREENE

T. C. Wehner, having been first duly sworn, states that he is the Manager, Property Tax, of the Burlington Northern Railroad Company, plaintiff in this case; that he has read the foregoing complaint and that the facts stated therein are true to the best of his knowledge, information and belief.

/s/ T. C. Wehner
T. C. WEHNER

Sworn to and subscribed before me this 28th day of February, 1983.

s// William J. Graham
WILLIAM J. GRAHAM
Notary Public

My Commission Expires:
March 8, 1985

[EXHIBIT A, Consisting of Text of Section 306, Omitted in Printing]

EXHIBIT B

[SEAL]

Odie A. Nance, Chairman
Robert L. Wadley, Vice-Chairman
J. L. Merrill, Sec'y-Member

OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA
2501 Lincoln Blvd.
Oklahoma City, Oklahoma 731940001

May 6, 1982

Burlington Northern Railroad Company
T. C. Wehner, Land and Tax Comm.
3253 East Chestnut Expressway
Springfield, MO 65802

Gentlemcn:

In a previous communication directed to you by Lewis H. Bohr, Director of our Ad Valorem Tax Division, you were advised that you would not receive a notice this year from the Oklahoma Tax Commission regarding acceptance of or a proposed change in your 1982 ad valorem assessment return. For the purpose of filing a protest or asking for a conference, this still holds true.

However, we believe you should have knowledge of the findings which we have already presented to the State Board of Equalization so you will be aware of the character of the data pertaining to your 1982 assessment with which the Board will be working when it meets to set the 1982 assessed values for your company and others. After the Board meets and sets the values, it will mail to you its official notice, and that will start the statutorily prescribed protest period.

Accordingly, for informational purposes only, and based upon our determined fair cash value for your taxable

property of $126,194,733 and an applied assessment ratio of 10.87%, the proposed assessed value before penalty, if any, on your taxable property which has been submitted to the State Board of Equalization for its consideration is $13,717,367.

No reply to this correspondence is required or expected, since it does not constitute official notice.

Sincerely,

/s/ Odie A. Nance
ODIE A. NANCE
Chairman

/s/ Robert L. Wadley
ROBERT L. WADLEY
Vice-Chairman

/s/ J. L. Merrill
J. L. MERRILL
Secretary-Member

JLM:jr

EXHIBIT C

[SEAL]

STATE BOARD OF EDUCATION
111 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3016

Gov George Nigh
Chairman
Tom Daxon
Secretary

Dina L. Reese
Administrative
Assistant

May 21, 1982

Burlington-Northern Railroad Company
T. C. Wehner, Land and Tax Commissioner
3253 East Chestnut Expressway
Springfield, Missouri 65802

Gentlemen:

At a meeting of the State Board of Equalization, held at the State Capitol, Oklahoma City, Oklahoma, on May 19, 1982, your Oklahoma property, subject to ad valorem taxation, was assessed for 1982. Based upon a fair cash value of $126,194,733, and using a ratio of 10.87%, your assessed valuation for 1982, including penalty, if any, is $13,717,367.

In accordance with the provisions of 68 O. S., 1971, Section 2466, this amount will stand as final assessment unless written protest is filed by you with the Secretary of this Board within ten (10) days from the date of this notice. This protest must specify your "* * * grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition in such a manner as to enable a person of common understanding to know what is intended."

Should you desire a hearing before the State Board of Equalization regarding the assessed valuation of your

property, a date will be fixed for same upon receipt of your complaint, and you will be duly notified of such date.

Sincerely,

/s/ Tom Daxon
TOM DAXON
State Auditor and Inspector
and
Secretary, State Board of
Equalization

TD/dld

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-83-419-R

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Defendants.

[Filed Nov. 9, 1983]

AMENDMENT TO COMPLAINT

Pursuant to leave of Court granted by an order filed herein on November 3, 1983, the plaintiff, Burlington Northern Railroad Company (BN), hereby amends its complaint in this action by adding the following sentence to paragraph 41 of the complaint:

> "BN alleges that the defendant, in valuing BN's property for the 1982 tax year, purposely overvalued BN's property with discriminatory intent".

Respectfully submitted.

Everett B. Gibson
James W. McBride
Gergory G. Fletcher
LAUGHLIN, HALLE, CLARK,
GIBSON & MCBRIDE
1700 K Street, N.W.
Suite 1101
Washington, D.C. 20006

PIERSON, BALL & DOWD

By /s/ David Machanic
DAVID MACHANIC
MICHAEL MINNIS
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 235-7686
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that on this 9 day of November, 1983, a true and correct copy of the above and foregoing Amendment to Complaint was mailed, postage prepaid, to:

Oklahoma Tax Commission
Office of General Counsel
Larry Blankenship, Esq.
Gary W. Gardenhire, Esq.
Donna E. Cox, Esq.
Room 1 - 35
2501 Lincoln Building
Oklahoma City, Oklahoma 73104
ATTORNEYS FOR THE OKLAHOMA TAX COMMISSION and ODIE A. NANCE, ROBERT T. WADLEY, and J. L. MERRILL, Individual Members of the Oklahoma Tax Commission;

and,

Office of the Attorney General
State of Oklahoma
James B. Franks, Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
ATTORNEYS FOR THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA and GEORGE NIGH, SPENCER BERNARD, LEO WINTERS, JACK CRAIG, CLIFTON SCOTT, DR. LESLIE FISHER and MIKE TURPEN, Individual Members of the State Board of Equalization of the State of Oklahoma.

/s/ Michael Minnis
MICHAEL MINNIS

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-100-A

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

vs.

GERALD D. BAIR, Director of the
Department of Revenue of Iowa,
Defendant.

[Filed July 16, 1986]

ORDER

The above-entitled matter is before this Court upon remand from the Eighth Circuit Court of Appeals.

Plaintiff filed this action March 2, 1983, contending that the property tax system of the State of Iowa discriminated against it three ways in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat., 31, 54 (codified at 49 U.S.C. § 11503). This Court found in favor of plaintiff on one issue holding that fifty percent of the plaintiff's property was personal and should be taxed in the same manner as all other personal property in Iowa. 584 F. Supp. 1229 (S.D. Iowa 1984). The claim that in certain years Iowa assessed all of Burlington Northern's property well in excess of its true market value was dismissed. On March 15, 1985, the Court, in an unreported ruling and order, by applying the arbitrary and capricious standard, held in favor of the de-

fendant on plaintiff's claim that Iowa assessed most other commercial and industrial property at a much lower percentage than Burlington Northern's property.

In *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985) the Court of Appeals held that this Court erred:

> (1) in aggregating Burlington Northern's real and personal property in its section 306(1)(a) analysis; (2) by imposing an improper burden of proof; and (3) in failing to make findings of fact on assessment values and true market values.

On remand, no additional evidence was taken, briefing has been completed and the case came on for oral arguments June 23, 1986. Before the Court is Burlington Northern's claim under section 306(1)(a), 49 U.S.C. 11503(b)(1), (c), for proper equalization asserting that the ratio of assessed value to true market value of Burlington Northern's real property exceeds the ratio of assessed value to true market value of all other commercial and industrial real property by at least five percent. This claim is based on *de facto* discrimination. Iowa law does not contain different assessment rates, but Burlington Northern claims that the tax system operates in such a manner as to discriminate against it.

Defendant's original brief on remand quoted a considerable portion of this Court's March 15, 1985, Ruling and Order and argued that the court had previously made the factual findings required by the Eighth Circuit Court of Appeals and that nothing in the circuit opinion required alteration. The Court does not agree. In reviewing the same seven errors urged here, the Court merely found that the Department did not act arbitrarily or capriciously in using the methodology it did. The Court did make some further findings of fact. The Court will not treat them as the law of the case, but will reconsider such findings in the light of further argument and the

change in the burden of proof to be used. A closer examination is called for when the Court must determine the preponderance of the evidence, rather than decide whether the conduct of the defendant was arbitrary or capricious.

> In order to make the comparison for equalization purposes under section 306(1)(a), the district court must make findings of fact on: (1) the assessed value of plaintiff's property; (2) the true market value of plaintiff's property; (3) the assessed value of all other commercial and industrial property in the same assessment jurisdiction; and (4) the true market value of all such other commercial and industrial property. The district court must calculate the two ratios and determine whether they vary by at least five percent.

Burlington Northern Railroad Company v. Bair, 766 F.2d 1222, 1226 (8th Cir. 1985).

Because of the unique nature of railroad operating property, Iowa, like most states, values it for ad valorem tax purposes as a unit. The unit concept is based on the principle that the operating property derives its true value, not from the sum of its parts, but from the integrated use of all of such property to carry traffic, generate income and render public service. As railroads are rarely sold as operating units, comparable sales are unavailable and other methods must be used to attempt to arrive at the value of the operating property of the railroad. Accepted methods are (1) the capitalized earnings method (income method); (2) the stock and debt method; and (3) the depreciated cost method.

The parties do not quarrel about the use of the unit concept nor is there disagreement over the percentage of railroad operating property allocated to Iowa. They also agree on the above methods of evaluation, but differ over the way each method should be applied in attempting to value railroad operating property.

The Court will begin its analysis by considering the most difficult and complex of the four factors upon which findings of fact must be made.

TRUE MARKET VALUE OF PLAINTIFF'S PROPERTY

Burlington Northern contends the Department has made seven significant errors in its valuation process as follows:

A. In weighting the three accepted methods of determining market value.

B. In the income method:

1. in forecasting earnings,
2. in its treatment of current deferred federal income taxes;
3. in its treatment of current liabilities.

C. In the stock and debt method:

1. in the determination of common equity,
2. in the treatment of current liabilities,
3. in the treatment of accumulated deferred federal income taxes.

In attempting to arrive at the true market value of Burlington Northern's real property, the Court will use as a starting point, The Appraisal Report of the Operating Properties of Burlington Northern Railroad by the Iowa Department of Revenue for January 1, 1981 and January 1, 1982 (exhibits CC and DD). The Court will then discuss each of the claimed errors and arrive at the principles to govern the determination of market value of the plaintiff's for the operating property years in issue.

A. *In weighting the three accepted methods of determining market value.*

In arriving at their opinions as to the unit value of plaintiff's transportation property, the parties gave the three methods referred to above the following weight:

Method	Plaintiff	Defendant
Income	50%	30%
Stock and Debt	50%	60%
Depreciated cost	0%	10%

The depreciated cost method presumes that the value of railroad system property is equal to its original cost less recorded depreciation and estimated obsolescence. It is primarily an accounting procedure. Any relationship between depreciated cost and value would be coincidental. Mr. Nicholson, the Supervisor for Central Assessment for the State of Iowa, testified that "the cost approach in no way or in very little respects would indicate market value." The Court holds that the Department erred in giving the depreciated cost method any weight under the circumstances of this case.

The income approach attempts to arrive at the fair market value of the railroad's transportation property by capitalizing the income generated by the railroad as an operating unit. Here the parties have agreed as to the appropriate rate of capitalization but have substantial differences as to the proper stream of income to be used in the computation.

The stock and debt method utilizes the railroad's outstanding debt and the equity in all of its securities. The theory is that the true market value of the asset side of the balance sheet is arrived at by properly valuing the debt and equity side of the balance sheet. The parties have significantly different opinions as to the proper way to use the stock and debt method.

Both methods require the exercise of considerable judgment on the part of the appraisers. The Court does not believe that either is preferable. The Department erred in giving more weight to the stock and debt method than the income method. The income method is the most direct measure of the investor's or buyer's interest. Prospective buyers of stock or the system are not interested in the railroad property as such, but in the income that an investment in that property will generate.

The Court holds that the plaintiff has established by a preponderance of the evidence that in determining the unit value of plaintiff's operating property, the income method and the stock and debt method should be weighted equally and that the cost method should not be used.

B. *In the use of the income method.*
B-1. In forecasting earnings.

In the income approach, plaintiff used the average of its computation of the operating income of Burlington Northern for the last five years on the theory that this method leveled out the extra-ordinary large items in the income stream and minimized the distortions associated with investment tax credits. The Department uses plaintiff's current year's income from operations to forecast plaintiff's income for the next year. Although the Department's use of current earnings may cause the projected income to fluctuate more from year to year, there was no showing that over the years plaintiff would be prejudiced. Very few railroad appraisers use the five year income average. The evidence has shown that the operating income of Burlington Northern has risen substantially over the last several years and its president expects the trend to continue. This evidence, coupled with the general long term inflationary trend, persuades the Court that the use of the current year's operating income to forecast the next year's income is more appropriate. Use of the five year average would result in

a consistent underestimation of plaintiff's earnings for the next year, and consequently undervalue plaintiff's transportation property. If the trend should reverse and the operating income decrease, the plaintiff would have the immediate advantage of the effect of that decrease on the next years evaluation.

Plaintiff has failed to establish by a preponderance of the evidence that the defendant erred in using the current year's operating income to forecast the income to be capitalized under the income method.

B-2. In treating deferred taxes.

For book and financial reporting purposes railroads use the straight-line method of computing depreciation prescribed by the I.C.C. However, in order to stimulate investment in new assets, federal tax laws permit taxpayers to depreciate certain assets for tax purposes at a faster rate in the early years of an asset's life and at a slower rate in the later years. Regardless of whether accelerated or straight-line depreciation is used, total depreciation cannot exceed the cost of the asset. Conceptually, the use of accelerated depreciation for federal income tax purposes simply defers payment of a portion of a taxpayer's ultimate federal income tax liability. Publicly held companies, including railroads, are required to report the total tax expense attributable to pretax earnings, but divide the total tax between that which is currently payable under federal law and that which is deferred.

In arriving at its forecast of plaintiff's operating income, the Department allowed only the taxes currently paid as a deduction and did not consider 50 million dollars of deferred taxes as an expense. This method increases the market value of the transportation property by 250 million dollars. The plaintiff treats deferred taxes as they are treated under Generally Accepted Accounting Principles (GAAP) and ICC Regulatory Accounting

and does not add the deferred tax expense back into the amount of income to be capitalized. Plaintiff's position is supported by the only three reported cases, *In re Southern Railway Co.*, 329 S.E.2d 235 (N.C. 1985); *Southern Railway Co. v. State Board of Equalization*, 682 S.W.2d 196 (Tenn. 1984); *Pacific Power & Light Co. v. Department of Revenue*, 496 P.2d 912 (Ore. 1979). This Court takes a different view.

Mr. Nicholson, the Supervisor of Central Assessment for the State of Iowa testified that studies show that deferred taxes are not paid back because for capital-intensive companies, they either grow or are constant. *See* Davidson, Kirsch & Palast, *What Others Think, Utilities Accelerated Depreciation and Income Tax Allocation: An Empirical Study.* Public Utilities Fortnightly-July 2, 1981. He concluded that investors are aware of this additional source of capital and therefore he included deferred taxes in arriving at the railroad's income stream. (Tr. 648-649)

The Court is of the opinion that the assumption that deferred taxes will continue to grow and actually will never be paid back is supported by the studies and logic. If deferred taxes are not added into the income stream, the plaintiff would have an increased flow of capital that would not be capitalized. On the other hand, if investments would be less than the depreciation, a negative deferred tax situation would develop where more taxes were actually being paid than would have been paid under the straight-line method, plaintiff's income would be reduced by that amount and the property value lowered accordingly. As it appears that a consistent underestimation of operating income will probably develop if it is not determined by taxes actually paid, and as there would be no prejudice over the long run to plaintiff if deferred taxes are not treated as an expense in arriving at income, the Court believes that the plaintiff has failed to establish by a preponderance of the evi-

dence that the defendant erred in computing operating income by using taxes actually paid and not treating deferred taxes as an expense.

However, for the period of time involved, there is an extraordinary item of deferred taxes that does not fit within the above analysis. Beginning in 1981, the Internal Revenue Service (IRS) permitted railroads to write off the undepreciated base in their track accounts over a five year period. Burlington Northern elected to use an accelerated depreciation method. In 1981, this IRS regulation created a deduction of $400,000,000 and reduced income taxes by over $192,000,000. No additional money was invested. The IRS just permitted a shorter period to write off investments previously made. Deferred taxes were created by the difference between the deduction allowable under the double declining balance method and the straight-line method. These deferred taxes are not within the courts justification for the use of taxes actually paid. The railroad did not invest any additional capital. It just accelerated the depreciation on previous investments in track and roadbed. The deferred taxes on this item should not be added back into the income stream.

The Court holds that the plaintiff has not shown by a preponderance of the evidence that the Department erred in its treatment of deferred taxes except to the extent that it included therein the extraordinary item discussed above.

B-3. In treating current liabilities.

One of the Department's expert witnesses, Dr. Martin Gruber, added current liabilities into the value arrived at under the income method. Neither Dr. Schoenwald nor Mr. Nicholson did so. Current liabilities were not used in the final calculations of the Department under the income method. As the Court has used such calculations as a starting point and examined them with respect

to the errors urged by plaintiff, the Court need not determine whether Dr. Gruber's add-on of current liabilities is improper. Defendant does not urge that this add-on should be made. If a determination were required, the Court would find that current liabilities should not be added.

Plaintiff has established by a preponderance of the evidence that it is not proper to adjust the income stream to reflect terms of current liabilities.

C. *In the stock and debt method.*

The stock and debt approach to value is based upon the premise that the aggregate market value of a company's outstanding stock and debt reflects the market value of the company's assets. Plaintiff challenges the Department's (1) determination of the value of Burlington Northern's common equity; (2) treatment of current liabilities; and (3) treatment of deferred taxes.

C-1. Valuation of the railroad's common equity.

As Burlington Northern Railroad is a subsidiary of a holding company, Burlington Northern Inc (BNI), which also includes companies engaged in oil and gas exploration and production, forest products, coal and other minerals, land, trucking and air freight, there is no public trading in the stock of Burlington Northern Railroad as such. Only BNI's stock is publicly traded. In attempting to determine the market value which investors purchasing BNI's stock have placed on the operating railroad properties one must separate the railroad stock from that of the other subsidiaries. An investor would, in purchasing BNI stock consider the income streams and risks attributable to each of these major affiliates and the potential of each in terms of dividends or growth, quality of earnings, the industry involved, the risk of such a company and its relationship to the total assets of the holding company.

In its final computations, the Department arrived at the market value of the equity in Burlington Northern by multiplying the market value of the equity in BNI—a known figure—by the ratio of the book value of investment in the railroad operating property to the book value of the investments in BNI. (89.42%). The Department's expert Dr. Gruber arrived at the market value of the equity in Burlington Northern by multiplying the total equity of BNI "by the ratio of total income available to equity of the rail subsidiary to the income available to the equity of the holding company." (EE p. 7)

The most that can be said for these techniques is that they are simple and objective. The Court has already stated that depreciated cost has little or no relationship with value. Book value as used here is equally worthless. As pointed out above an investor takes many factors in addition to income into consideration in determining the market value of a stock. Reliance on one factor could seriously distort the market value an investor would place on the stock of the railroad subsidiary. For instance, BNI owns the largest coal reserves in the United States except for the government. Those reserves would contribute significantly more to the equity value of BNI than the limited income from the coal properties. The Court believes the simplistic methods urged by the Department fail to properly account for the fundamental variances among BNI's various holdings, and fails to consider other factors that can influence an investor's opinion as to the market value of stock.

The price/earnings (P/E) multiple used by Dr. Schoenwald and Mr. Batkin, expert witnesses for plaintiff, reflects an investor's total interest in a stock including risk, growth, earnings, as well as other factors that may apply to a particular industry and a specific company. Lehman Brothers, of which Mr. Batkin is a managing director, was asked to "determine the average market value which investors would have placed on the net assets

of the non-rail properties of Burlington Northern Inc. during the calendar year 1981." Lehman used indices of companies that it determined were in comparable businesses with each of the various BNI subsidiaries. With the exception of the coal and mineral business, Lehman used the average price/earnings multiple for 1981 for the companies selected as comparable. The estimated market value for the coal and mineral business was valued at 2¢ a ton for 15 billion tons of reserve-or $300,000,000.

Sometime later Lehman used a similar technique to arrive at P/E ratios to be applied to the BNI railroad property. By using the six major railroad systems in the country, Lehman arrived at a P/E multiple of 8.4. By eliminating Union Pacific which received almost one-half of its earnings from gas and oil, the P/E ratio dropped to 6.3. Norfolk and Southern, which was a well respected almost pure railroad, had a P/E ratio of 6.1. Because Burlington Northern was not viewed by Lehman as being of an equally high quality, Lehman used the P/E ratio of 5 as an approximation for this railroad.

Dr. Schoenwald applied a P/E ratio of 14 to the income derived from all of BNI's non-railroad subsidiaries, relying on Standard & Poor's security analyst handbook, and applied a P/E ratio of 4 to the railroad operating income "since railroad income is valued relatively poorly and since BN had performed more poorly than other railroads."

The evidence convinces the court that the best way to determine the market value investors would place on the Burlington Northern railroad property in deciding whether to purhase BNI stock is by the application of the appropriate P/E ratio to the income derived from the railroad operation and each of the other subsidiary operations individually. It would be highly unlikely that the total of such estimated market values would equal the actual market value of BNI common equity, a known

figure, as it is publicly traded. It therefore appears that a further calculation is required. The total value that has been computed should be compared with the market value of BNI common equity and the common equity of the railroad property increased or decreased by the percentage of difference.

Having determined the most appropriate method to arrive at the market value of the railroad's common equity, under the opinion of the Circuit Court of Appeals, the Court must now determine the appropriate P/E ratio to be used in arriving at the value of the common equity of the railroad property and each of the subsidiaries of BNI. The Court agrees with the classification of BNI's non-rail subsidiaries found in Exhibit I to Plaintiff's Exhibit 19. The Court understands that there is no dispute over the income stream assigned to each of the subsidiaries. The Court also accepts the 2¢ per ton value for coal reserves as a proper valuation for the coal and mineral business.

The selection of the appropriate P/E ratio is a crucial decision in the evaluation process. Although concrete figures are used, subjective judgment is necessary in deciding what companies to use as comparables and where to place Burlington Northern in the comparison with those companies to arrive at the appropriate P/E ratio. Had the Department used the method approved by the Court, considerable deferrence would have been accorded the expertise used in determining comparable companies and the proper place the specific BNI subsidiary occupied in relation to those companies and their established P/E ratios. As the Department used other techniques not approved by the Court, the Court must determine from the evidence the P/E ratio to be applied to each BNI subsidiary including the railroad for the years in issue.

The Court accepts as comparable the companies used by Lehman and listed in Plaintiff's Exhibit 19. (All subsidiaries except the railroad and coal and mineral.)

However, as most of them are considerably larger than the comparable BNI subsidiary and are leaders in the particular industry, the court believes that the application of the average P/E ratio of those companies to BNI subsidiaries would tend to inflate the market value of the common equity of the BNI subsidiary. Rather than being in the middle of the group the court is of the opinion that the BNI subsidiary would more likely be in the bottom third. Therefore in computing the appropriate P/E ratio to be used in determining the market value of the common equity of each BNI subsidiary, the selected comparable companies may be used, but the P/E ratio should be set at the lower ⅓ level rather than in the middle of the group. Although Exhibit 19 relates to 1981 only, the P/E ratios established by use of this exhibit may also be applied to 1982.

The P/E ratio to be applied to the railroad operating income is 5.5 to 1. Dr. Schoenwald's multiple of 4 is not acceptable. Lehman's discount of the P/E ratio for operating railroads to 5 for the performance of Burlington Northern is not justified under the evidence. While its operation does not equal that of the most efficiently operated lines, a lowering of the P/E ratio to 5.5 sufficiently incorporates its lesser performance.

In this area the Court has attempted to provide the principles, methods and, where necessary, the specific figures that will enable the parties to use their expertise to compute the market value of the common equity prospective investors would attribute to each of BNI's subsidiaries. The figures for the subsidiaries, including the railroad property, should be totalled and compared with the known market value of the common equity of BNI. The market value of the common equity of the railroad property should be increased or decreased in proportion to the difference.

C-2 In the treatment of current liabilities

The Department, in attempting to arrive at the value of the railroad operating property by the stock and debt method, included net current liabilities [1] on the righthand side of the balance sheet. The railroad included current liabilities, but also deducted current assets which exceed current liabilities by approximately $200,000,000. The different treatment of current assets and liabilities accounts for an evaluation difference of $912,000,000.

The Court is unable to understand how either of the above methods is very helpful in attempting to arrive at the unit value of the railroad operating property. If the Department's method is accepted, you arrive at a total for the asset side of the balance sheet which includes current assets, like accounts receivable which do not contribute to the operating income and should not be included in the unit valuation procedure. In addition, the higher the amount of current liabilities outstanding, the higher the unit value of railroad operating property when there does not appear to be any rational relationship between the two figures. If the railroad's method is adopted, the higher the ratio of current assets to liabilities, the less valuable the railroad operating property as a unit, because, under the railroad's approach, the value is decreased by the excess of current assets over liabilities. Neither method makes much sense to the Court and the results seem unrelated and incongruous.

In its post trial memorandum, the railroad argues as follows:

> Mr. Nicholson and Dr. Gruber simply add current liabilities to the gross stock and debt value of the

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[1] Current liabilities 788,318,000
Equipment obligations and other [longterm debt] due in one year (76,296,000)
712,022,000

company. Dr. Schoenwald, on the other hand, nets current liabilities with current assets to get something akin to a net working capital amount.

The working capital position of any company is a function of its production cycle, which is the period from the purchase of raw materials through the conversion into salable goods and the billing process until the collection of the receivable. Although the cycle takes different forms in different businesses, the longer it is—the greater the burden. Thus, a company with high current liabilities and high current assets is not more valuable with all other things being equal. Therefore, only the net working capital position is relevant to the valuation process.

Perhaps a more dramatic illustration would involve 100 persons each of whom owed $100 to another person and was owed $100 by another party. Under the balance sheet identity of the Stock and Debt Approach, the $100 liability would create the appearance that there was a taxable asset of $100. Clearly, each person's net position is "zero". At a tax of $2, the taxing authority would claim $200 which exceeds any one of the original debts (or assets) involved in this illustration. This result is unfair and unreasonable, and simply derives from the methodology being used. It can, however, be rectified properly and easily by considering the net working capital position.

The excess of current assets over current liabilities is something "akin to net working capital". In the Court's opinion net working capital should be included in attempting to evaluate the railroad's operating property. However, the Court does not agree with the way it was used by the railroad. The railroad deducted net working capital from the stock and debt side of the balance sheet, thus lowering the value of the railroad operating property. The Court believes that net working capital should add to the value of the operating property rather than decrease it. The Court believes this is consistent with the railroad's concept of the stock and debt method. Dr. Schoenwald testified:

> This method assumes that the value of taxable property may be determined by summing the market value of all of a company's outstanding securities, plus the value of leased equipment and other obligations, *less a deduction for non taxable assets.* (Emphasis added.)

Although net working capital is not property directly subject to real estate taxes, it does contribute toward the operating income flow of the railroad and should be included when the unit value method is being used. To deduct all of the current assets would confuse the valuation of particular assets with the unit method and would not be proper. By including working capital as contributing to the income flow, you have in effect deducted non-taxable assets. If you limit operating railroad property to just real and personal property and eliminate working capital as contributing to the stream of income from operations, you are departing from the unit value method of arriving at the value of railroad operating property and turning to the valuation of property as such.

Other than the railroad's reference to the working capital, the Court has found nothing in the filings of either party that would tend to support the Court's above analysis and conclusion. This result certainly does not adhere to the Department's view of the stock and debt method. While the Court found some comfort in the railroad's language, the Court's treatment of net working capital is opposite to the way the railroad treated working capital. It may very well be that the Court's lack of expertise in this area has caused the Court to take an erroneous approach to this important issue. However, when one keeps in mind that we are here trying to arrive

at the unit value of the railroad's operating property for purposes of taxation, rather than the total asset value for the sale or purchase, the method adopted by the Court seems most appropriate. The primary question is whether the Court is correct in treating net working capital as contributing to the stream of income from operations. If the Court is correct, net working capital is properly includible in arriving at the unit value of the railroad's operating property.

The Court finds that in valuing railroad property as a unit under the stock and debt method, current liabilities should be deducted from current assets and the resulting figure, approximating working capital, if positive, should be added to the remaining elements on the right hand side of the balance sheet. If negative, it should be deducted.

C-3 Treatment of accumulated deferred income taxes

In its stock and debt approach the Department adds to the aggregate market value of the railroad's securities the amount of accumulated deferred federal income taxes. The railroad takes the position that the value of these deferred taxes is already reflected in the market value of the securities. The Court agrees with the plaintiff.

The Court has adopted the price/earnings ratio as the proper way to value a company's equity under the stock and debt approach. That method presupposes that the price of a stock reflects its income-earning potential. Deferred taxes have some value to the company. In determining the appropriate P/E multiple to be used in determining the market value of the common equity, the Court gave consideration to the accumulated deferred federal income taxes. The Department's expert Dr. Gruber testified that there is considerable debate as to whether accumulated deferred federal income taxes should be included under the stock and debt approach. In order to be conservative he, like Dr. Schoenwald, did not add deferred taxes into his evaluation.

The Court finds that the plaintiff has established by a preponderance of the evidence that deferred federal income taxes are reflected in the market value of the securities and that they should not be included as a separate item under the stock and debt method.

The Court has attempted to consider all of the claims of the plaintiff relating to the railroad's true market value and to furnish all the principles and specific figures the parties will need in order to compute the true market value of the real property that is a part of the plaintiff's railroad operating property. The parties by utilizing their expertise can make the necessary computations with greater accuracy and ease than the Court. If the Court has not made all findings that are required, the parties can so inform the court.

ASSESSED VALUE OF BURLINGTON NORTHERN'S REAL PROPERTY

A pre-trial stipulation contained the final assessments on Burlington Northern according to the records of the Department. Mr. Nicholson testified at trial that certain errors in the final assessment were pointed out during discovery and that corrections had been made, all favoring the railroad. As an injunction has been in effect, recertification awaits a final determination of the court. The corrected assessment has been used by the parties. At the trial, the parties agreed that these corrected figures would be binding for these particular tax years.

The Court therefore finds that the assessed value of plaintiff's real property in Iowa is $34,105,774 for 1981 and $33,373,092 for 1982.

THE ASSESSED VALUE OF ALL OTHER COMMERCIAL AND INDUSTRIAL PROPERTY IN THE SAME ASSESSMENT JURISDICTION

The parties have stipulated as to the assessed value of (1) locally assessed commercial and industrial prop-

erty for 1981 and 1982; (2) locally assessed property, traditionally considered as personal property taxed in Iowa as real property for 1981 and 1982; and (3) the total appraised value of all utilities, except railroads, for 1981 and 1982. The parties disagree as to which stipulated figures should be included as components in the right hand side of the formula:

Assessed Value of Rail Transportation Property		Assessed Value of All Other Commercial and Industrial Property
	Must Not Exceed by 5 per cent	
True Market Value of Rail Transportation Property		True Market Value of All Other Commercial and Industrial Property

The railroad takes the position that only commercial and industrial *real* property assessed locally and all centrally assessed utility property should be included. The Department includes, in addition, the locally assessed personal property taxed as real estate. The Court agrees with the Department.

The Eighth Circuit Court of Appeals stated on this issue:

> The court cannot require Burlington Northern to extend its equalization complaint to personal property. However, in making the section 306(1)(a) ratio comparison, the court may include all other commercial and industrial property, real and personal, assessed by the Department of Revenue. Section 306(1)(a) requires comparison of property "in the same assessment jurisdiction * * *." Since the Department of Revenue asessses utility properties as a unit, without differentiating between real and personal, it would be very difficult for the court to segregate the real property for purposes of comparison. And because the Department of Revenue treats personal property as real property, with no valuation

> rollbacks, this comparison is not unfair. It would, however, be improper to include Burlington Northern's personal property, which is entitled to a rollback, in the ratio comparison.

Burlington Northern R. Co. v. Bair, 766 F.2d at 1225.

While the Court of Appeals allowed the railroad to separate out its real property on its equalization claim, it did not say that only locally assessed real property should be used. The locally assessed personal property taxed as real property must be included. As the Court of Appeals pointed out:

> The relevance of classification as personal or real property for tax purposes is that personal property receives preferential tax treatment.

Ibid. at 1224.

Commercial and Industrial personal property taxed locally as real property does not receive the tax preference given personal property. It is taxed as real property and is a proper component of the formula. If such property is not included, you do not get a fair comparison of the properties taxed as real estate.

The Court finds that the following schedule constitutes the assessed values of properties to be used in computing the formula set forth above.

1981	100% Market Value As Assessed	§ 427A(1) Assessment Limitation Factor % [2]	Assessed Value
COMMERCIAL Land and Bldgs. [Comm. Real Prop.]	$ 9,007,527,000	[87.84%]	$ 7,912,418,000

[2] Under Section 441.21, Code of Iowa, the plaintiff's real rail transportation property is entitled to the assessment limitation factor applied to either commercial real property or industrial real property, depending on which is lower. For the 1981 and 1982 tax years, the plaintiff's real rail transportation property was credited with the commercial assessment limitation factor, or 87.84% in tax year 1981, and 91.63% in 1982.

COMMERCIAL Machinery and Equip. [Comm. Per. Prop. Taxed as Real Prop.]	198,684,000	[100]	198,684,000
INDUSTRIAL Land and Bldgs. [Ind. Real Prop.]	2,047,336,000	[96.96]	1,985,136,000
INDUSTRIAL Machinery & Equip. [Ind. Personal Prop. Taxed as Real Prop.]	1,705,670,000	[100]	1,705,670,000
UTILITY PROPERTY [All Prop., Real & Per., Taxed as Real Property]	4,983,001,595	[100]	4,983,001,595
	$17,942,218,595	[93.55]	$16,784,909,595

1982	100% Market Value As Assessed	§ 427(a)(1) Assessment Limitation Factor %	Assessed Value
COMMERCIAL Land and Bldgs. [Comm. Real Prop.]	$ 9,213,440,049	[91.63]	$ 8,442,275,117
COMMERCIAL Machinery & Equip. [Comm. Per. Prop. Taxed as Real Prop.]	243,119,066	[100]	243,119,066
INDUSTRIAL Land and Bldgs. [Ind. Real Prop.]	2,159,675,449	[100]	2,159,675,449
INDUSTRIAL Mach. & Equip. [Ind. Per. Prop. Taxed as Real Prop.]	1,992,841,952	[100]	1,992,841,952
UTILITY PROPERTY [All Prop., Real and Per., Taxed as Real Prop.]	5,145,795,656	[100]	5,145,795,656
	$18,754,872,172	[95.89]	$17,983,707,240

TRUE MARKET VALUE OF ALL OTHER COMMERICAL AND INDUSTRIAL PROPERTY

In it's Ruling and Order of March 14, 1985, in discussing the true market value of all other commercial and industrial property, the Court stated:

> Contract sales are expressly excluded from consideration in appraising real property values in Iowa because such sales are *deemed* not to reflect the market value of the property. See Iowa Code § 441.21 (1) (b).

P. 17 (emphasis supplied), and

> The Court finds that on the evidence presented defendant's appraisals more accurately reflect one-hundred percent market value of all commercial and industrial property than does the skewed and limited sales assessment evidence presented by plaintiff. Under these circumstances the Court need not look to the sales assessment ratio data presented by plaintiff as the sole, definitive measure of the sales assessment ratio for all commercial and industrial property. *See Atchison, Topeka & Santa Fe Ry. v. Lennen*, 732 F.2d 1495, 1503-04 (10th Cir. 1984); *Ogilvie v. State Bd. of Equalization*, 492 F.Supp. 446, 451-52 (D. N.D. 1980), *aff'd*, 657 F.2d 204, 209 (8th Cir.), *cert. denied* 454 U.S. 1086 (1981).
>
> Plaintiff has in no way shown that defendant's appraisal of all commercial and industrial property was arbitrary or capricious. The Court, therefore, concludes that defendant's appraisals of all commercial and industrial property for tax years 1981 and 1982 will be *deemed* to represent one-hundred percent of true market value.

(Emphasis supplied.)

The Court believes that the inappropriate use of "deemed" in the above quotes caused the Court of Appeals to state:

> In *making findings of fact on assessed values and true market values, the district court may not rely on Iowa Code § 441.21(1) to hold that assessed values equal true market values.* There is always a subjective element to valuation. While section 441.21 (1) precludes de jure discrimination, there remains the possibility of de facto discrimination if, as a result of error or purpose, the assessed values vary from the true values. Section 306(2)(e), which covers the situation in which separate data for commercial and industrial property cannot be adduced, implies that the *court must rely on actual evidence rather than a statutory definition such as section 441.21(1).*

(Emphasis supplied.)

This Court did not rely on the requirements of the Iowa Code that real property be value at 100% of true market value to create a presumption or even an inference that that is what the Department did. Nor did this Court intend to base its findings on the statutory definition of true market value. However, the Court does find Section 441.21(1)(b),[3] which defines market value

[3] b. The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property except as otherwise provided in this section. "Market value" is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value. In arriving at market value, sales prices of property in abnormal transactions not reflecting market value shall not be taken into account, or shall be adjusted to eliminate the effect of factors which distort market value, including but not limited to sales to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit.

and identifies matters to be considered or not considered, is supported by other evidence and does contain an accurate and generally accepted definition. The evidence presented at trial supports the exclusion of contract sales as an abnormal sale not reflecting market value.

The Court intended to make findings of fact upon the *actual* evidence presented at trial. The Court finds that the sales assessment ratio studies, the only evidence presented by the railroad, does not accurately reflect the sales assessment ratio of all industrial and commercial property in Iowa because it contains many real estate contract sales, which the Court finds are abnormal sales not reflecting actual market value and because the studies are limited to urban and rural commercial real property. The defendant offered evidence tending to establish that the state has reached its goal of valuing the property at 100% of true market value. Although there is some duplication of the above findings, rather than amplify them further, the Court will include herein portions of the previous unreported Ruling and Order.

> Plaintiff presented no evidence concerning the appraisal of commercial and industrial personal property; commercial and industrial personal property taxed as real property; and utility property. Instead, plaintiff presented 1981 and 1982 sales assessment ratio studies of urban and rural real property published by defendant pursuant to Iowa Code § 421.17(6), and similar sales assessment ratio data on industrial property for 1980, 1981, and 1982, to show that all commercial and industrial property is appraised at less than true market value. According to plaintiff, under section 306(2)(e) the sales as-

sessment ratio of urban commercial real property (taken from the published studies) and the sales assessment ratio derived from the industrial data must be considered as conclusive proof that defendant appraises *all* commercial and industrial property at only approximately eighty-nine percent of true market value.

Defendant challenges the accuracy of the results from the published studies and industrial data. The sales assessment ratio study data offered by plaintiff is skewed, according to defendant, because it contains data on abnormal transactions. The published sales assessment ratio studies include data on contract sales. Contract sales are expressly excluded from consideration in apprising real property values in Iowa because such sales are deemed not to reflect the market value of the property. *See* Iowa Code § 441.21(1)(b). Defendant's expert testified that contract sales are not commonly considered in sales assessment ratio studies because the contract sales price does not reflect market value. The evidence shows that contract sales assessment ratios were very often lower than deed sales assessment ratios. In addition, the sales assessment ratio data on industrial property includes data on such things as sales of vacant buildings, which defendant's expert stated would not be considered in a reliable sales assessment ratio study.

Defendant also contends that plaintiff's method for establishing the sale assessment ratio of all commercial and industrial property is flawed because the sales assessment evidence offered by plaintiff concerns only commercial urban real property and industrial property. Plaintiff requests that the Court extrapolate from the data on these two classes of property to establish the sales assessment ratio for all commercial and industrial property.

The Court agrees with defendant that the sales assessment ratio evidence presented by plaintiff should not be used to determine the sales assessment ratio for all commercial and industrial property. The data presented is skewed because it includes data on transactions not reflecting true market value. The Court also does not feel that the limited data offered by plaintiff can properly form the basis for the determination of the sales assessment ratio of all commercial and industrial property.

Furthermore, plaintiff did not show that defendant's appraisal process is flawed. Defendant's experts testified that every effort is made to appraise all commercial and industrial property at one-hundred percent of market value. One of defendant's experts, Brian Bruner, testified that defendant's appraisal of commercial real property takes into account reliable data from the sales assessment ratio study, numerous independent appraisals, and reviews made of local assessor's records, and assessment levels. Industrial property is appraised in much the same manner, with a higher degree of review made of local assessor's actions. All local assessors continually receive the benefits of educational materials and programs to assist them in maintaining accurate appraisals.

Burlington Northern Railroad Co. v. Bair, No. 83-100-A, slip op. at 16-18 (SD IA March 14, 1985).

Although it would be highly unlikely that the Department was successful in assessing all other commercial and industrial property at 100% of its true market value, the Court need not and is not making such a finding. The Court of Appeals stated:

> • • • the Department of Revenue assessments are entitled to great deference. We hold that the burden is on Burlington Northern, as the party attacking the accuracy of the Department values, to show

by a preponderance of the evidence what the accurate values are.

Burlington Northern Railroad Co. v. Bair, 766 F.2d at 1226.

The railroad has not met its burden. The only evidence it offered was not satisfactory to the Court for the reasons given above. The Court concludes on the basis of the evidence presented and by giving deference to the assessments of the Department of Revenue that the assessed values and market values of all other commercial and industrial property are the same.

CONCLUSION

The Court in this ruling has attempted to set forth principles, specific figures, findings of facts and conclusions of law that will enable the parties, by using their expertise, to arrive at the four factors to be included in the formula set out above. The computation will reveal whether the ratio of the assessed value of the railroad's real property to its true market value is at least 5% greater than that ratio of all other commercial and industrial property in Iowa, as identified herein.

As the Court cannot determine at this time which is the prevailing party, the Court directs the plaintiff to take the responsibility for the preparation of an Order for Judgment in accordance with this Ruling and Order and submit the same to the defendant for comment or approval. Any questions about the Ruling and Order may be submitted to the Court.

IT IS SO ORDERED.

Signed this 16th day of July, 1986.

/s/ W. C. Stuart
W. C. STUART
Judge
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C85-767T

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

-vs-

DEPARTMENT OF REVENUE OF THE STATE
OF WASHINGTON, *et al.*,
Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

WHEREAS plaintiff Burlington Northern Railroad Company filed an amended complaint for injunctive and declaratory [sic] relief alleging a violation by the defendants of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, 90 Stat. 54 (Feb. 5, 1976), 49 U.S.C. § 11503, resulting from the valuation, assessment and equalization by the defendants for the tax year 1984 of the plaintiff's transportation property within the State of Washington; and

WHEREAS plaintiff filed a motion for a preliminary injunction restraining and enjoining the defendants, and each of them and their agents and those acting in concert or participation with them, from valuing, assessing and equalizing plaintiff's transportation property for the 1984 tax year in violation of § 306 and from collecting or causing to be collected the ad valorem tax payment due on or before October 31, 1985, which collection would also violate § 30; and

WHEREAS a hearing was held on October 4, 17, 18 and 21, 1985, at which time the parties appeared through

counsel and presented testimonial and documentary evidence as well as legal arguments; and

WHEREAS the Court has considered the legal briefs and arguments presented by the parties, the documentary evidence of the parties, and the testimony of Dr. Arthur A. Schoenwald for the plaintiff and Mr. Thomas Eden for the defendant Department of Revenue, and good causing appearing;

NOW, THEREFORE, THIS COURT FINDS:

1. That this Court has jurisdiction under § 306 and in exercising its jurisdiction to determine if discrimination which is prohibited by § 306 exists, this Court can make findings of fact regarding the discriminatory impact upon plantiff resulting from certain methods of assessment utilized by defendants in calculating the true market and assessed value of plaintiff's transportation value.

2. That plaintiff, for purposes of obtaining a preliminary injunction, must prove, and has proven, reasonable cause to believe that § 306 has been, and is about to be violated by the defendants, and that plaintiff must prove, and has proven, reasonable probability of success in prevailing at a trial on the merits of this matter. In so doing, plaintiff established a reasonable probability of proving at trial:

(a) That the defendants' assessed value of plaintiff's transportation property for 1984, allocated to the State of Washington, is $316,865,788.00 (plaintiff's exhibit 14);

(b) That the true market value of plaintiff's transportation property for 1984, allocated to the State of Washington, is significantly less than the value computed by defendants. (plaintiff's exhibit 13).

(c) That the defendants, in applying their three indicators to value and their allocation formula, have

knowingly used principles and techniques which cannot properly be applied to railroads and which have been rejected by the courts, which are fundamentally flawed, which result in a value which is substantially higher than true market value, and which systematically discriminate against the plaintiff.

The preceding results from the following acts of defendant:

(1) A determination in the derivation of the cost indicator that no allowance should be made for obsolescence to plaintiff's property rather than an allowance of 36.2% (plaintiff's exhibit no. 2, p. 46).

(2) The use of a limited life sinking fund model which has caused the value of plaintiff's property derived from the income indicator to be fixed at $3,115,146,000.00 (defendant's exhibit A-1) rather than $2,286,414,000.00 (plaintiff's exhibit no. 7).

(3) The use of the income and property influence method rather than the direct method which has overstated the value of plaintiff's property derived from the use of the stock and debt indicator by $1.4 billion (plaintiff's exhibit no. 4).

(4) The use of depreciation accounting rather than retirement-replacement-betterment (RRB) accounting in fixing valuations for plaintiff's property through the income and cost indicators.

(5) The use of the cost indicator, together with the income and stock and debt indicators, rather than the income and stock debt indicators only, in arriving at a final system valuation for transportation property.

(6) The use of an allocation factor of 8.77% which did not include in its computation an alloca-

tion of plaintiff's rolling stock between the State of Washington and other operating locations of such stock, rather than 8.23%, the factor submitted by plaintiff, in apportioning transportation property to the State of Washington for ad valorem property tax purposes.

(d) The use by the State of those improper methods and techniques of appraisal, described in the preceding paragraph, has caused the ratio of the assessed value of plaintiff's transportation property to actual true market value to exceed by at least 5% the ratio of assessed value of all other property in the assessment jurisdiction to the true and fair value of such property.

(e) That the differences between the plaintiff's value and the defendants' value do not result from a difference in professional opinion but result from the fundamental errors contained in the defendants' valuation model.

3. That § 306 discrimination need not be purposeful or intentional by the defendants. *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985); *Louisville & Nashville Railroad Co. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984). However, even if § 306 required the defendants to purposefully and intentionally discriminate against the plaintiff, the plaintiff has, at this stage of the proceedings, established reasonable cause to believe that the §§ 306 discrimination was purposeful and intentional and has established a reasonable probability of success in prevailing at a trial on the merits of this matter.

ACCORDINGLY, IT IS HEREBY ORDERED

1. That Defendants, and those acting in concert or participation with them, be and they are hereby enjoined,

pendente lite, from the collection or distribution of ad valorem property taxes payable by the plaintiff to the State of Washington and its taxing districts on or before October 31, 1985; are further enjoined from causing the assessment of interest or penalties by reason of the nonpayment of such taxes, until further order of the court.

2. That plaintiff is directed to pay into the registry of the Court, for deposit into an interest-bearing account, on or before October 31, 1985, the amount of those taxes the collection of which is hereby enjoined.

3. That the defendant, Department of Revenue of the State of Washington, shall recalculate its assessment of plaintiff's transportation property to correct that part of its previous assessment found by the Court to be in error. Defendant shall further recalculate the amount of taxes payable in 1985 which are not based on values preliminarily found by the Court to be excessive. Defendant shall immediately serve upon plaintiff a copy of its computations.

4. That the parties may thereafter, by stipulation, apply to the Court for modification of its order to permit distribution from the registry of the Court to defendant, Department of Revenue, that part of the taxes agreed to be proper for distribution pendente lite. In the absence of such stipulation defendant may move for modification of this order and upon answer by plaintiff the matter shall be submitted without further hearing.

5. That in the event plaintiff objects to defendants' calculations of taxes for distribution, plaintiff shall file notice of its objections with the Court. Thereafter defendant may move for modification of this order to permit distribution of the taxes, and upon answer by plaintiff, the motion shall be submitted without further hearing.

6. Any further proceedings herein, other than those matters abovementioned, shall be stayed pending further Order of this Court.

DATED, at Tacoma, Washington, this 25th day of October 1985.

/s/ Joel E. Tanner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 85-2102LE

UNION PACIFIC RAILROAD COMPANY, and ITS LESSORS OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY and OREGON SHORT LINE RAILROAD COMPANY,
Plaintiffs,

v.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON and THE STATE OF OREGON,
Defendants.

Civil No. 85-2103LE

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff,

v.

DEPARTMENT OF REVENUE OF THE STATE OF OREGON and THE STATE OF OREGON,
Defendants.

[Filed May 6, 1986]

ORDER

Plaintiffs in this consolidated action, Union Pacific Railroad and Burlington Northern Railroad (the Railroads), brought this action under the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, claiming that the State of Oregon has violated the Act

because the methods used by the Oregon Department of Revenue to appraise the Railroads' property result in overassessment. Defendants, the Oregon Department of Revenue and the State of Oregon, move to dismiss and to abstain.

DISCUSSION

Motion to Dismiss. Section 11503(b) makes it unlawful for a state to:

> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Section 11503(c) gives federal district courts jurisdiction to prevent a violation of subsection (b). Such relief may be granted only:

> if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction.

To determine whether relief is appropriate the court must compare two ratios: the ratio of the assessed value of "transportation property" to its true market value, and the ratio of the assessed value of all other commercial and industrial property in the same assessment jurisdiction to its true market value.

Comparing these ratios would seem to require the Court to make findings of fact as to the ratios' four components: the assessed value of the railroad property, the true market value of the railroad property, the assessed value of other commercial and industrial property in the same assessment districts and the true market

value of the commercial and industrial property. The statute provides that, in making such findings, "the burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11503(c).

Defendants contend that the court does not have jurisdiction to make an independent determination of the true market value of railroad property. They argue that because the statute contemplates use of a sales assessment ratio study in determining the true market value of commercial and industrial property, but gives no direction as to how the true market value of railroad property is to be determined, by implication, the court may not make that determination. Defendants also argue that legislative history supports their interpretation.

Defendants' interpretation is contradicted by the plain language of the statute. True market value, as used in § 11503, must have a same meaning throughout. If Congress intended true market value to have one meaning with respect to commercial and industrial property and another meaning with respect to railroad property, the statute would have so specified. The starting point in every case involving construction of a statute is the language itself. *Landreth Timber Co. v. Landreth*, 105 S.Ct. 2297, 2301 (1985). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Shields v. U.S.*, 698 F.2d 987, 989 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 73 (1983). 49 U.S.C. § 11503 is clear on its face. In determining whether the statute has been violated, the court has jurisdiction to consider evidence and make factual findings as to the true market value of the Railroads' property.

Motion to Abstain. Defendants argue that, even if the court has jurisdiction, the court should abstain from the exercise of such jurisdiction until after the Railroads have exhausted their remedies under state law, or, at

least, until the Ninth Circuit Court of Appeals has ruled on the jurisdiction question.

Section 11503(b)(2) prohibits states from levying or collecting a tax on an assessment prohibited under subsection (b)(1). The national policy against discriminatory taxation of railroads reflected in § 11503 requires federal district courts to hear § 11503 cases brought before them. *Southern Railway Company v. State Board of Equalization*, 715 F.2d 522, 530 (11th Cir. 1983). The motion to abstain is denied.

IT IS ORDERED that defendants' motions to dismiss and abstain are denied.

Dated this 5th day of May, 1986.

/s/ Edward Leavy
United States District Judge

[SEAL]

THE STATE OF WYOMING

Ed Herschler
Governor

AD VALOREM TAX DIVISION

THE DEPARTMENT OF REVENUE
AND TAXATION

Herschler Building 122 West 25th Street
Cheyenne, Wyoming 82002-0110

Burlington Northern Railroad
J. H. Kenny—Mgr. Property Taxes
2100 First Interstate Center
999 Third Avenue
Seattle, WA. 98104

Ad Valorem Tax Division
Phone 307/777-7215

Warren A. Bower
Director

Robert St. Clair
Assistant Director

June 13, 1985

RE: Notice of Assessed Valuation for Taxation Purposes
The State Board of Equalization has, under the provisions of Title 39-2-201, Wyoming Statutes 1977, placed a valuation on your RAILROAD property in Wyoming in the following amount for taxation purposes for the year 1985:

Taxable Assessed Valuation	$26,975,450

Title 39-2-201(d) provides that appeals of taxable values set by the State Board of Equalization may be filed in writing within fifteen (15) days following receipt of notice. If the last day for filing the appeal falls on Saturday, Sunday or a holiday, the appeal shall be timely if received by the end of the first succeeding working day. An appeal and all papers in connection therewith shall be considered filed by the Secretary to the Board as of the date of postmark when sent by United States mail.

An appeal shall set forth what is being appealed, shall state, in ordinary and concise language, the facts upon

which the appeal is based, and shall state the relief desired. The notice of appeal must also contain the petitioner's address.

/s/ Robert R. Forsberg
ROBERT R. FORSBERG
Supervisor of State Assessments
Ad Valorem Tax Division

RRF/lb

[SEAL]

THE STATE OF WYOMING

Ed Herschler
Governor

AD VALOREM TAX DIVISION

THE DEPARTMENT OF REVENUE
AND TAXATION

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Burlington Northern Railroad
J.H. Kenny—Regional Director
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777 Main Street
Fort Worth, TX 76102

Ad Valorem Tax Division
Phone 307/777-7215

Warren A. Bower
Director

Robert St. Clair
Assistant Director

July 3, 1986

RE: Notice of Assessed Valuation for Taxation Purposes
The State Board of Equalization has, under the provisions of Title 39-2-201, Wyoming Statutes 1977, placed a valuation on your RAILROAD property in Wyoming in the following amount for taxation purposes for the year 1986:

Taxable Assessed Valuation $56,197,574

Title 39-2-201(d) provides that appeals of taxable values set by the State Board of Equalization may be filed in writing within fifteen (15) days following receipt of notice. If the last day for filing the appeal falls on Saturday, Sunday or a holiday, the appeal shall be timely if received by the end of the first succeeding working day. An appeal and all papers in connection therewith shall be considered filed by the Secretary to the Board as of the date of postmark when sent by United States mail.

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which the appeal is based, and shall state the relief desired. The notice of appeal must also contain the petitioner's address.

/s/ Robert R. Forsberg
ROBERT R. FORSBERG
Supervisor of State Assessments
Ad Valorem Tax Division

RRF/lb